

## Episode 4: Title IX

**Dara Purvis:** And I worry that this door is kind of open too wide, that so many schools and so many people are just going to frame bans using the language from the regulations, that it's going to be extremely difficult, extremely burdensome, and extremely unlikely that trans students will actually get much protection.

**Sara Gras:** I'm Sara Gras and this is Season 1 of Hearsay from the Sidelines, a show about the place where law, sports and culture intersect brought to you by Culture in Sports and Seton Hall Law School's Gaming, Hospitality, Entertainment and Sports Law program. This is Episode 4: Title IX. I'm going to start by picking up the history of interscholastic sports where the last episode left off, just half a century ago in the early 1970s. The Vietnam War was winding down, Watergate was in the news, and Boomers were raising the first members of Gen X.

When Title VII of the Civil Rights Act of 1964 finally made sex-based employment discrimination unlawful, it set the stage for discussions about gender equity in other spaces, including education. A special subcommittee of the House Committee on Education and Labor held seven days of hearings in 1970 to address the unfair treatment of women in U.S. colleges and universities. Legislators were faced with overwhelming empirical evidence of gender disparity, particularly in graduate and professional schools, who still had caps on the number of women who could be admitted to their programs. Representative Patsy Mink, who championed Title IX in the House, provided testimony at that hearing. In her remarks, she said, "Our nation can no longer afford this system which demoralizes and demeans half the population and deprives them of the means to participate fully in our society as equal citizens."<sup>1</sup> It's hard to imagine now, but these academic programs were dominated by men. When my mother went to medical school in 1972, she was one of 2300 women starting the academic year with 11,377 men.<sup>2</sup> Law school admissions were similar – in 1972, 5,508 women started their first year of law school with 29,593 men.<sup>3</sup> The gender gap in undergraduate enrollment was somewhat less stark. In 1972, 37.6% of 18- to 19-year-old men were enrolled in college compared to 34.3% of women in the same age group. But the gap widened considerably as the age range increases – for 20- and 21-year-olds, the percentage of men is 36% but only 25.6% for women.<sup>4</sup>

As I mentioned in Episode 2, Title IX was a small part of a huge education bill passed in 1972 that addressed a wide range of issues. The language was simple: No person in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. It did not mention sports, nor were athletic programs really even a consideration leading up to the bill's passage. But when the implications for male-dominated athletic programs became clear, the all-male NCAA started to lobby to exempt

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<sup>1</sup> *Elimination of Discrimination Against Women in Higher Education: Hearing on H.R. 16098 § 805 Before the Spec. Subcomm. on Educ. of the H. Comm. On Educ. and Lab., 91st Cong. (1970)* (testimony of Patsy T. Mink, Representative of Hawai'i), available at: <https://www.loc.gov/item/mss8495700102/>.

<sup>2</sup> W.F. Dubé & Davis G. Johnson, *Study of U.S. Medical School Applicants, 1972-73*, 49 J. MED. EDUC. 849, 850, 858 (1974), DOI: 10.1097/00001888-197409000-00005.

<sup>3</sup> Millard H. Ruud, *That Burgeoning Law School Enrollment Slows*, 59 A.B.A. J. 150 (1973).

<sup>4</sup> DEPT OF COM., BUREAU OF THE CENSUS, *School Enrollment in the United States: 1972*, P-20 CURRENT POPULATION REP. NO. 247 (1973), available at: <https://www2.census.gov/library/publications/1973/population/p20-247.pdf>.

interscholastic sports entirely from Title IX's application.<sup>5</sup> While Congress acted quickly to make it clear that Title IX WAS intended to apply to athletics, figuring out the specifics of what that meant was delegated to the Department of Education's predecessor, the Department of Health, Education, and Welfare in a 1974 amendment.<sup>6</sup>

The pervasive concern expressed at the time was that equitable treatment for female athletes would destroy scholastic sports. If schools invested in girls and women's athletics this would surely take away important resources from boys and men. When the Department's Office of Civil Rights proposed regulations to implement Title IX for institutions that received federal funds, they got over 10,000 public comments, 90% of which were about athletics.<sup>7</sup> These proposed regulations were not heavy-handed or overly explicit in their requirements – they did not require gender-blind tryouts or end single-gender teams – and schools were not required to match spending on girls teams to spending on boys.<sup>8</sup> The final athletics rule ended up being fairly similar to what was proposed. It states that no person shall be excluded from participation in, or the benefits of, school athletics on the basis of sex, and that separate teams cannot be created as a way to discriminate or exclude. However, separate teams are permitted for contact sports OR where selection is based on competitive skill. If a school offers a sport for one sex, but not the other, and the excluded sex has previously had limited athletic opportunities, then interested students of that sex should be allowed to try out. The exception to this provision is if the sport is a contact sport, which includes, but isn't limited to, boxing, wrestling, rugby, ice hockey, football, and basketball.<sup>9</sup> The three-part test<sup>10</sup> that guides assessment of compliance with the regulations requires institutions to meet one of three standards:

1. The first is a proportionality standard – participation opportunities substantially proportionate to enrollment.
2. The second is by showing a “history and continuing practice of program expansion” responsive to the developing interest and abilities of the underrepresented sex.
3. The third is by showing the interest and abilities of the underrepresented sex have been fully and effectively accommodated by existing offerings.

This focus on the expansion of opportunities in athletics for women and girls has been criticized as unfairly discriminating against boys since it may actually provide girls with MORE opportunity when compared with their interests and abilities.<sup>11</sup>

But as one of my guests, Professor Kim Yuracko, emphasized in a 2002 article, distribution of opportunities based on interest wouldn't adequately address the broad structural inequity in sports

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<sup>5</sup> WOMEN'S SPORTS FOUND., 50 YEARS OF TITLE IX: WERE NOT DONE YET, 19 (2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

<sup>6</sup> Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974), available at: <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg484.pdf>.

<sup>7</sup> *Supra* note 5, at 21.

<sup>8</sup> Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 39 Fed. Reg. 22236 (proposed June 20, 1974) (to be codified at 45 C.F.R. pt. 86), available at: <https://www.govinfo.gov/content/pkg/FR-1974-06-20/pdf/FR-1974-06-20.pdf>.

<sup>9</sup> 34 C.F.R. § 106.41, available at: <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S41>.

<sup>10</sup> As articulated in the HEW Policy Interpretation in 1979. Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71419 (Dec. 11, 1979), available at: <https://www.govinfo.gov/content/pkg/FR-1979-12-11/pdf/FR-1979-12-11.pdf>.

<sup>11</sup> Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, 388 (Deborah Brake et. al. ed., 2021), <https://doi.org/10.1093/oxfordhb/9780197519998.013.25>.

since the availability of opportunities is an important factor in the development of both interest and skill.<sup>12</sup> And equal opportunity in the context of education, where interscholastic sports are both historically and presently situated, is not the same as in the context of employment where everyone should have an equal shot at every available position. The “tool-giving” model of equality of opportunity is premised on ensuring all children have an adequate or fair opportunity to develop skills and attributes for their future.<sup>13</sup> In this context, fairness does not mean everyone receives the same. This may be easier to conceptualize when we use a classroom example: there’s no expectation that every student receive the exact same amount of time and attention from their teacher. There will be students who struggle academically, who may have learning disabilities or other disadvantages that mean their teachers will need to work with them more to ensure they are able to develop and learn. While this means their peers may get less of a teacher’s individual time, this is generally not perceived as being unfair because it is the overall opportunity of the group to access the benefits of education that is valued rather than an individual’s share of instruction. I spoke with Kim about this distinction, particularly as it pertains to the possible interpretations of the proposed amendments to the Title IX regulations that I’ll be getting to shortly:

**Kim Yuracko:** Yeah, I agree. And the way that the fairness concern is sort of articulated right now in the proposed guidelines sort of, I think, leads people to think about fairness to individual athletes rather than sort of fairness to groups. And as I was saying previously, I think it’s basically impossible to distinguish between sort of different eligibility rules in terms of fairness to individuals. That is, I think there are innumerable possible eligibility rules that are all basically equally fair and unfair to the different participants. And it’s really hard, I think impossible, to claim that any individual participant or groups of participants, or sort of individual participants is entitled to one over the other. Now, if your view of fairness, or not yours, if the sort of...Biden administration view of fairness was focused not just on individuals but on sort of groups, then I think you might be able to sort of pull back and make arguments that in particular context one eligibility rule was going to sort of equalize benefits for groups more than another. But it’s not quite the way it’s written right now in the proposed regulation. Also from my own kind of vantage point, I think it would be helpful if the proposed regulations push schools when they’re making, when they’re sort of justifying how they draw their eligibility rules to also sort of highlight which kind of benefit they care most about. Because again, sort of fairness, if we’re talking about a world where we should care or a context where we should care most about basic benefits, fairness there, I think we would have wider spread agreement on what fairness looks like for the distribution of health benefits.

I think we would be able to get widespread social agreement that when we talk about health benefits, basically everybody should have equal access and we should just do a lottery with missions. And if you still want to do sex segregation, pretty much everyone should just get an option. And so I would think it would be a benefit if schools were pushed to talk about which kind of advantage, which kind of benefit they’re focusing on most. But I absolutely agree with you that when we talk about fairness to individuals, it gives us very little traction to either say that an eligibility rule is fair or unfair.

**Sara Gras:** Title IX’s existing regulatory framework has had a positive impact on the overall participation of women and girls in school athletic programs. High school varsity sports participation for girls went from 294,015 in 1972 to 3,402,733 in 2018. NCAA varsity sports participation for women went from

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<sup>12</sup> Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible*, 97 NW. UNIV. L. REV. 731, 753-54 (2002).

<sup>13</sup> *Id.* at 767-68.

29,977 to 219,177 in the same period. But as many legal scholars and advocates of women's sports point out, inequality persists half a decade after Title IX's enactment. Data from the National Federation of State High School Associations shows that there is still a sizeable gap between high school athletic opportunities for boys and girls with 57% designated for boys and 43% for girls in the 2018-19 academic year<sup>14</sup> and those gender gaps are much larger in heavily minority schools.<sup>15</sup> There are external forces that perpetuate gender-based inequality in sports that Title IX cannot directly regulate. Professor Erin Buzuvis cites the difference in booster club fundraising for boys vs. girls teams, and the willingness of fans to pay more to watch men's vs. women's sports as examples.<sup>16</sup> She writes that, "the act of separation itself is inherently unequal because it constructs the stigmatizing stereotype that female athletes are inferior."<sup>17</sup> These stereotypes are internalized and perpetuate the perception that separate sports teams are necessary, even at the grade school level. They are also, I think, at the root of this struggle to embrace trans athletes, even as our culture evolves in our understanding of gender identity and expression. But the law no longer defines sex as a strict binary – we have expanded our understanding of sex discrimination to include discrimination based on sexual orientation, gender expression, and gender identity. I spoke with Erin about how these changes have impacted her scholarship on Title IX.

**Erin Buzuvis:** In the early 2000s, 2010, plus or minus a few years, courts were really starting to get their heads around the application of sex discrimination statutory provisions to LGBTQ rights, generally speaking, and exploring the relationship between sex, which is what the statutory provision says, and other things that are connected to or viewed in relation to sex, such as gender, gender identity, gender expression, and sexual orientation. And so there had been a number of employment discrimination cases, hiring cases, but also more interesting to me from an athletic standpoint, bathroom cases and dorm cases, because like athletics, those are also spaces that are segregated on the basis of sex. And then in even in the Title IX context, there were there was one short-lived district court level opinion challenging exclusion of someone from a sports team under Title IX because of their because of their sexual orientation, because the players involved were lesbians.

And so we're starting to see at that time, courts really digging into, I think, a compelling, intellectually challenging question about how we talk about sex when we are considering its application beyond the sort of early era, more straightforward applications of sex discrimination laws in general. So it really was a natural fit for somebody writing about Title IX and interested in those cases to think about how, for example, bathroom access cases could translate into the context of athletics, or how a case about lesbian basketball players could translate into the context of trans girls playing girls sports.

**Sara Gras:** Because the existing regulations are not specific about whether Title IX's use of the term "sex" should be understood as strictly rooted in biological characteristics or whether they should utilize a person's identified gender, interpretations and guidance issued by executive agencies has not been consistent. During the second Obama Administration, the Department of Education and the DOJ issued guidance construing Title IX as requiring students be treated consistent with their gender identity.<sup>18</sup> The Education Department's Office of Civil Rights issued a letter responding to a question regarding

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<sup>14</sup> *Supra* note 5, at 30

<sup>15</sup> *Id.* at 32

<sup>16</sup> *Supra* note 11.

<sup>17</sup> *Id.*

<sup>18</sup> Title IX: Who Determines the Legal Meaning of "Sex"?, CONG. RSCH. SERV. (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10229> [<https://perma.cc/7LV7-4SKC>].

transgender students' access to restrooms in January of 2015.<sup>19</sup> Citing relevant cases, including *Price Waterhouse v. Hopkins*,<sup>20</sup> *Barnes v. City of Cincinnati*,<sup>21</sup> and *Schwenk v. Hartford*,<sup>22</sup> as well as adjudications and guidance from other federal agencies, OCR took the position that Title IX enforcement prohibits discrimination on the basis of gender identity. The letter also cited the publicly available resolutions of two OCR investigations involving transgender students where the schools agreed to revise policies to allow transgender students to use restrooms based on their gender identity.<sup>23</sup> In 2016, DOJ's Civil Rights Division and OCR jointly released a Dear Colleague Letter on transgender students which stated that schools should "treat a student's gender identity as the student's sex for the purposes of Title IX."<sup>24</sup> But there was never a judicial ruling on the enforceability of either the guidance or the Dear Colleague letter because the Trump Administration rescinded both documents in a subsequent Dear Colleague letter in early 2017, citing a need "to further and more completely consider the legal issues involved."<sup>25</sup>

Then came the Biden Administration, which has been dealing with the flood of anti-trans state laws since day one. President Biden has publicly demonstrated his support for trans rights, although not to the extent some activists would like to see,<sup>26</sup> and the agency actions have not all been in line with the President's views. Following the Supreme Court's decision in *Bostock v. Clayton County*,<sup>27</sup> the Education Department posted a memo from their Office of General Counsel stating that *Bostock* does not affect the meaning of "sex" as the term is used in Title IX, and affirms the "Department's long-standing construction of the term 'sex' in Title IX to mean biological sex, male or female."<sup>28</sup> This was quickly walked back by the issuance of an official OCR Interpretation that sought to make clear that Title IX's

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<sup>19</sup> Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, Off. for C. R. to Emily T. Prince (Jan. 7, 2015) (on file with Bricker & Eckler, LLP), available at:

[https://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](https://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf)

<sup>20</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (concluding that Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination bars discrimination based on gender stereotyping)

<sup>21</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-39 (6th Cir. 2005) (holding that demotion of transgender police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII).

<sup>22</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1201-2 (9th Cir. 2000) (holding that discrimination against transgender females is actionable discrimination "because of sex" under the Gender Motivated Violence Act").

<sup>23</sup> *Arcadia Unified School District*, OCR Case No. 09-12-1020 (July 24, 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>; *Downey Unified School District*, OCR Case No. 09-12-1095 (October 14, 2014), available at <https://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

<sup>24</sup> Letter from Catherine E. Lhamon, Assistant Sec'y for C. R., U.S. Dep't of Educ. and Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just. to Colleague (May 13, 2016) (on file with the U.S. Dep't of Educ.), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>25</sup> Sandra Battle Acting Assistant Sec'y for C. R., U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Assistant Att'y Gen. for C. R., U.S. Dep't of Just. to Colleague (Feb. 22, 2017) (on file with the Dep't of Educ.), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>26</sup> Meryl Kornfield, *Biden's Tricky Path on Trans Issues*, WASH. POST (June 15, 2023, 5:00 am EDT), <https://www.washingtonpost.com/politics/2023/06/15/bidens-tricky-path-trans-issues-forceful-cautious/>.

<sup>27</sup> *Bostock v. Clayton*, 140 S. Ct. 1731 (2020).

<sup>28</sup> Memorandum for Kimberly M. Richey, Acting Assistant Sec'y of the Off. for C. R. (Jan. 8, 2021) (on file with the Dep't of Educ.), available at: <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

prohibition of sex discrimination includes “discrimination based on sexual orientation and gender identity” based explicitly on the Court’s decision in *Bostock*.<sup>29</sup>

But it seems like perhaps the swinging pendulum may be brought to a standstill since, for the first time since their inception, the Title IX regulations are on the verge of an update. The Education Department proposed amendments to the Title IX regulation on athletics on April 13, 2023.<sup>30</sup> This was a follow-up to rule changes proposed in 2022 that addressed a number of other Title IX issues, including sex-based harassment, pregnancy discrimination, and discrimination on the basis of sexual orientation and gender identity.<sup>31</sup> The proposed Athletics rule provides a standard that would “govern a recipient’s adoption or application of sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female athletic team consistent with their gender identity.”<sup>32</sup> Most significantly, the changes would make any categorical ban on participation on a single-sex athletic team consistent with gender identity a violation of Title IX. This is huge – don’t get me wrong. But - there’s always a “but” – this does not mean schools cannot implement policies that restrict trans athlete participation. Sex-related criteria for participation that denies or limits participation consistent with gender identity COULD be permissible if that criteria is “substantially related to the achievement of an important educational objective,” AND minimizes harms to the students whose opportunities for participation would be affected. And this is where things started to seem a little less sunny to me as I read through the Notice of Proposed Rulemaking.

I want to start with what it means to be “substantially related” to an “important educational objective.” The NPRM does explicitly state that the asserted purpose cannot rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females,”<sup>33</sup> nor can it be pretext for singling out transgender students.<sup>34</sup> But did provide some examples that raised some red flags, noting that the “prevention of sports-related injury is an important educational objective,” as is “fairness in competition.”<sup>35</sup> And the Department explicitly states that it “anticipates that a recipient might assert fairness in competition or prevention of sports-related injury as an important educational objective in its athletic programs, particularly for older students in competitive athletic programs.”<sup>36</sup> I will be talking extensively about the fairness and safety objections in the next episode, but for now, I’ll just say that these arguments are often rooted in misunderstandings or misapplications of unrelated scientific evidence, outdated beliefs about the physical inferiority of women, and overgeneralizations about athletic performance.

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<sup>29</sup> Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637, available at: <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>.

<sup>30</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023), available at: <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf>.

<sup>31</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022), available at: <https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf>.

<sup>32</sup> Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. at 22860.

<sup>33</sup> *Id.* at 22872, citing *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>34</sup> Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. at 22872.

<sup>35</sup> *Id.* at 22860-61.

<sup>36</sup> *Id.*

I discussed my concern that this language invites schools who want to limit trans inclusion to take advantage of the fairness and safety straw men in creating policies with almost everyone I interviewed for this show to get their take on the proposed rules. Here are some of Professor Dara Purvis's thoughts about the proposed changes and their potential to protect trans students from exclusion in athletics:

**Dara Purvis:** It will be interesting, I think, to see what the final regulations look like. But I am concerned at how much of a door the regulations, at least as they are initially drafted, how wide that doorway is to usher in kind of the fairness and safety justifications as an excuse for really broad exclusion.

So the new regulations say if a school wants to limit sports participation based on the sex that a student was assigned at birth, that limitation must be substantially related to the achievement of an important educational objective and minimize harms to students whose opportunities are limited. So we already know, as you've said, that the objectives that are offered by people trying to ban trans students will be fairness and safety. And there's no question, fair opportunities and keeping student athletes safe are important objectives. Absolutely no question with that. So the open question is, what is the relationship between sex assigned at birth and fairness and safety? So from my perspective, it seems pretty clear that this is an imperfect relationship at best. And that's why I think it is so helpful to look at these cases from the 1970s, because it gives such a clear example of how you say, well, you're just assuming that there is a relationship here. If you are saying it won't be fair and it won't be safe, you have to give us some facts to show that this is going to actually impact fairness and this is actually the best way for us to ensure the safety of student athletes. The regulations say we recognize fairness and safety as important. We received feedback from stakeholders about these concerns and the document does at least paraphrase some of the arguments that say, if you are concerned with these things, using sex assigned at birth as a proxy is not an effective way of ensuring fairness and safety. There are more specific and more tailored ways to do that don't involve these very broad and across-the-board bans. But at least as it's currently drafted, the standard seems to allow for a lot of exclusion based on those concerns that, again, I think may or may not have any link to gender identity, but it kind of provides a framework to say, well, we all agree that these goals are important and these are things that we do want, safety and fairness. And if you can sort of say strongly enough or just phrase your arguments to raise these concerns, it seems like that creates a viable excuse for a broad ban.

I would hope that the Department of Education and even individual school boards and legislators would recognize that these are imperfect fits, that there are much better ways to talk about fairness and safety. And there are important reasons, there are important things that are good about sports that we should want trans students to participate just as much as cisgender students do. But we already see a really strong anti-trans political movement in a lot of places throughout the country. We see a lot of variety school by school, school board by school board, state legislature by state legislature, and how willing they are to try to essentially legislate transgender people out of public spaces. And I worry that this door is kind of open too wide, that so many schools and so many people are just going to frame bans using the language from the regulations, that it's going to be extremely difficult, extremely burdensome, and extremely unlikely that trans students will actually get much protection.

**Sara Gras:** In addition to the concerns that Dara verbalized, the other potential problem that stood out to me was this requirement to minimize harm to the excluded student. Specifically requiring that the recipient's approach minimize harm, rather than requiring that the harm be de minimis, a term understood in the legal context to mean trivial or minor, means that some degree of harm is acceptable. This means that a recipient's sex-based criteria just needs to be the least harmful identifiable way of achieving their stated educational objective. In the example provided, a school might adopt sex-related

criteria that requires athletes to provide documentation of gender identity to ensure they are providing equal athletic opportunity to male and female teams, which is presumably an important educational objective. Even if you accept as true the idea that requiring athletes to “prove” their sex or gender has some relevance to an assessment of whether a school is providing equal opportunities for boys and girls, which I don’t, the likelihood that this requirement will cause harm to at least some trans athletes is significant. Unless that documentation can be provided solely through a student’s own self-reporting, such a requirement will probably require the involvement of a parent or clinician. For students who are not ready or able to be “out” to their families, it would mean they can’t participate in sports. The same could be true for a nonbinary student who isn’t necessarily comfortable with “choosing” a gender in an official and permanent way, but simply feels more comfortable playing on a sports team that does not align with their gender assigned at birth. While a requirement to provide documentation is LESS harmful than asking students to, for example, undergo invasive physical exams, it is much more harmful than having no such requirement. Yet a school could argue that having no requirement or allowing students to self-report would inhibit their ability to achieve this important educational objective of providing equal athletic opportunities. The proposed rules do not make it clear, as the Association of Title IX Administrators (ATIXA) points out in their public comment, whether the harm minimization analysis is individualized, whether documentation of less harmful alternatives were considered and rejected would be required, or whether recipients will be required to provide options to minimize harm based on a student’s unique circumstances.<sup>37</sup>

Of everyone I spoke to, Erin has written the most extensively about the importance of trans athlete inclusion at all levels of sport. Her 2016 article explicitly rejects virtually all barriers to gender-consonant participation in youth sports.<sup>38</sup> I shared my thoughts on the language of the notice of proposed rulemaking with her and asked whether she felt this language left too many unanswered questions to have a meaningful impact on trans kids, particularly in unwelcoming environments. Her response surprised me - she was more optimistic about the possible impact of these proposed regulatory amendments than I was - and her perspective did get me to think about them a bit differently.

**Erin Buzuvis:** Substantively, I have not backed down. I continue to endorse what I wrote in 2016, which is that I believe state athletic associations should be promulgating policies that maximize inclusion, that let kids play sports on the basis of their affirmed gender identity without adding any extra legal or paperwork or medical restrictions. So I'm all for maximizing inclusion. As a matter of process, in terms of how we get there, we have to think about how administrative agencies work, the fact that they have a variety of tools to create policy, the fact that they're connected to the political system and often have to take a pragmatic approach that lets them live to fight another day. And I think that might be a bit of what's going on here and why that regulatory provision, coming out of an administration that is saying in general, all the right things about the importance of trans inclusion and trans civil rights in a variety of contexts has introduced, as you say, the possibility of considering this issue from the standpoint of fairness, which is code for the possibility of excluding people if it's not fair for the cisgender girls who they're competing against. So I think that when a regulation is promulgated and it has built in gray area, it is also setting up the agency to clarify that gray area over time through enforcement action over time,

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<sup>37</sup> *ATIXA's Comments on the 2023 NPRM On Athletic Eligibility Under Title IX*, ASS'N OF TITLE IX ADM'RS BLOG (May 12, 2023), <https://www.atixa.org/blog/atixas-comments-on-the-2023-nprm-on-athletic-eligibility-under-title-ix/>

<sup>38</sup> Erin Buzuvis, *As Who They Really Are: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 MINN. J.L. & INEQ. 341, 375-6 (2016), available at <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1205&context=lawineq>.



kind of a common law approach, if you will, equivalent to addressing issues that are not specifically stated or a standard that isn't specifically stated.

So I think over time, the agency is setting itself up to define what it means to have an exclusion that's related to an important educational objective. That it's setting itself up over time to figuring out what minimizing harm means. And that it can do that in a way that takes into account potentially a more pragmatic incrementalist approach in a way that allows it to not draw the ire of political opponents who could potentially pass a statute that completely supersedes Title IX's application to this area. So it's possible that what DOE is doing is trying to use all the tools in its arsenal, right, as opposed to just trying to get everything done through this one potential, this one rulemaking process. Now, your question also asked about what is this going to, how is this going to affect school policies?

I think the reason why this incremental approach is worth considering and worth seeing the upside of it is that right off the bat, we have 22 states who have since 2020 passed categorical bans on trans girls inclusion in girls sports. And the regulation does make clear that in no world is a categorical ban going to pass muster under this new regulatory provision. So 22 states that have taken this extreme action will need to have some kind of reconciliation over that fact. And I think that is a huge counteroffensive that is being set up by this regulation.

And it might be worth not going for a regulation that mandates inclusion on all fronts for everyone, the rule I, in my heart of hearts, would like, if it means being able to, in the short term, address this very serious trend in state legislation. Now, enforcement will be tricky, what is Title IX but a civil rights law under the cloak of spending clause legislation, right? So Title IX says you can't discriminate if you take federal funding. And so the choice that any institution that wants to step outside of Title IX and do their own thing is to say, I am just not going to accept federal funding.

This is the approach that Grove City College pioneered when it said it did not want to conform to Title IX's requirements with respect to sex discrimination and proudly asserts on its website that students who apply better not be expecting federal financial aid because they have opted out of that federal program so that it can make its own decisions without influence of federal civil rights laws. So a state like Idaho that has a law that categorically bans trans girls from competing, schools in that state are going to have to make a choice. Either we comply with Title IX and continue to accept federal funding or we defy our state law. Well, defying state law might not be a choice if the state decides to aggressively enforce it. In which case Title IX says to Idaho schools, bye bye, right? No federal funding, no federal funding for you. You can go ahead and be discriminatory, but not with the federal taxpayers' dollars. That is a really extreme remedy that Title IX contemplates. And it has never before been deployed. It is, in some minds, I've called it in other contexts, a weapon that's too big to use. Because the consequences for that are bad for the school children of Idaho and any other state, right? That now does not have access to federal subsidies for school lunch, right? I mean, what kind of heartless government takes food out of the mouths of children?

So that's going to be a pretty tricky enforcement, like the optics of that enforcement process are going to be tricky to navigate. But what could potentially happen, this rule passes, that it gives ammunition to those in the state legislatures that oppose these bans in the first place to say, we cannot engage in a game of chicken with the federal government, with our children's education on the line, all we have to do is change this law and then see what happens, see how this works out. Maybe some more minimal restrictions will be upheld and we'll have to live with that. But the best case scenario would be that in response to this regulation, that state laws decide to change themselves to become compliant with Title

IX. If they don't, and enforcement takes place, this will be a historic application of Title IX to see it all the way through to the point of potentially withdrawing federal funds from schools that are forced by virtue of state law to have a policy that conflicts with Title IX.

**Sara Gras:** This issue of enforcement is one that I want to talk about a bit more because I think the reality of what it looks like to contest a school policy under Title IX is a big part of why I'm so troubled by the ambiguous language in the proposed rules. I asked Dara to explain this process for everyone in greater detail.

**Dara Purvis:** Sure, so say that you're a trans student, you may or may not already sort of be out as trans at school depending on how long a student has been going to school in that district and so on. So first of all, there's just a question of, do I even want to kind of out myself? Say they're willing to do that.

Now they and their parents would have to go to the school and say, it appears that there is this policy that would exclude me from whatever sports they want to participate in. They have to have some kind of meeting, confrontation, disagreement with the school saying we think that this policy is inappropriate. Presumably, if they're going to continue to sort of pursue this, the school says no.

So now the student is aware that, okay, the coach who I want to play for, the teachers and administration who I am still a student under, don't like that I'm doing this and disagree with me. And now I'm going to, in a completely legal way, kind of threaten them by saying, well, maybe we will try to file a complaint under Title IX. Maybe we are going to file a complaint against you. So again, you are telling the administration who is in charge of you, the coach you wanna play for, that you're going to file this complaint. There is a long, just administrative process. These kinds of complaints can take considerable lengths of time, especially depending on how often this is coming up, how many complaints like this are going on or are being sent along to the Department of Education.

So depending on the age of the student, if it's a high school junior or senior, it may not kind of be worth it from a time perspective because it may not even be able to be resolved while they're still eligible to participate. And if the Department of Education, on the one hand they may say, okay, school, this policy is insufficiently specific. This is too much of a bar, just a blanket ban - we need you to do something else, depending on how strongly the school wants to resist that, this could end up as a lawsuit. This could end up as the students suing their school district. So now this is a very public proceeding. It is likely, we try to keep minors' identities anonymous in most lawsuits, but it is quite likely that this would become publicized.

We have already seen students who have spoken up, for example, at school board meetings, you know, their faces and names being publicized in their community and beyond. So now this student and their family trying to say we want to play sports are engaged in litigation potentially against their school district, which number one will cost the school district money. So you're weighing how much I want to play sports against how much is this going to harm the school community? How much of a burden in terms of time and potentially money is this going to be on my family? How is this going to affect my relationships with other students, with the school? How will this affect other things going on in my life? College applications, things like that. And you see a huge impact on this family and on this community that a lot of people very understandably would be hesitant to take on, even if they feel strongly that the school's policy is wrong. This is really taking a student who is already very possibly vulnerable and pushing them forward even more into kind of the spotlight, into conflict with the school.

**Sara Gras:** So yes, if these regulations, or something very close to them, become final, it will become much more difficult for schools to exclude transgender students who want to play on school teams. But that doesn't mean some won't still try. And hopefully there will be kids and families with the courage and resources to challenge those policies to help clarify how these regulations should be applied, and hopefully those challenges come at a time where the presidential administration is friendly to those arguments and hopefully LGBTQ+ advocates can continue to fight the misinformation about trans people. But as the continuing inequity between male and female athletes illustrates, we can't fully legislate away discrimination. It will certainly help when parents and kids see firsthand that trans inclusion doesn't mean the end of girls sports, just as including women and girls didn't end sports 50 years ago. I do also think though, that for change to come at a pace that can impact the lives of trans kids now – not 20 years from now - we need to proactively dispel the myth that there is anything inherently unfair or dangerous about trans girls playing sports with cis girls.

This narrative has been, and will continue to be, a shield for everyone who is afraid to introduce any additional variables into the delicate ecosystem of youth sports, lest it have an impact on their child's future prospects. The next episode of the show will focus on biological difference and fairness and safety objection to trans inclusion. Thanks for listening.

*Hearsay from the Sidelines* is a collaboration of [Seton Hall Law School](#) and [Culture in Sports](#); All research and writing by Sara Gras; music by [SuperKnova](#); produced by Sara Gras and Dr. Jeremy Piasecki, Executive Director of Culture in Sports. Links to all available academic and primary legal sources, media, music, transcription, and other materials mentioned in this episode are available on the Hearsay from the Sidelines show page, [hearsayfromthesidelines.com](https://hearsayfromthesidelines.com). And if you like this show, check out [cultureinsports.com](https://cultureinsports.com) where you'll find more articles, shows, webinars, summits, and courses for sports leaders of all levels.